

FILED
MISSOULA, MT

2006 JUL 31 PM 12 49

IN THE UNITED STATES DISTRICT COURT PATRICK E. DUFFY
BY _____
FOR THE DISTRICT OF MONTANA DEPUTY CLERK

MISSOULA DIVISION

WAYLAND P. HARRIS,)	CV 03-168-M-DWM
)	
Petitioner,)	
)	ORDER
vs.)	
)	
MIKE MAHONEY,)	
)	
Respondent.)	
_____)	

This case is pending on Petitioner's third claim that he received ineffective assistance of counsel due to trial counsel's failure to perform any investigation and failure to object to testimony about the victim being hospitalized. On June 2, 2006, this Court issued an Order requiring Respondent to file the transcript of Petitioner's post-conviction evidentiary hearing held in state court in May 2002.

The Court must determine in light of *Moormann v. Schriro*, 426 F.3d 1044, 1058 (9th Cir. 2005) whether Petitioner has shown cause to excuse the procedural default of his claims that should have been raised either on direct appeal or in post-conviction proceedings.

After reviewing the transcript of the evidentiary hearing, it is clear that Petitioner's third claim is indeed procedurally defaulted. Although Mr. Sheehy drafted the petition for post-conviction relief, Petitioner represented himself at the evidentiary hearing and he did not raise the two ineffective issues argued in his third claim. Therefore, this case does not fall under the

Moormann decision and Petitioner cannot establish cause to excuse the procedural default of his third claim.

Accordingly, IT IS HEREBY ORDERED that:

Judge Erickson's Findings and Recommendations of October 27, 2004 (doc. 7), are **ADOPTED** as to Petitioner's third claim and that claim is **DENIED** on the merits. Mr. Harris' petition for writ of habeas corpus is **DENIED** and the Clerk of Court is directed to close this matter.

DATED this 31st day of July, 2006.



Donald W. Molloy, Chief Judge
United States District Court

